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IN THE

# Supreme Court of the United States

**October Term, 1954**

No. 24

COMMISSIONER OF INTERNAL REVENUE,
*Petitioner,*

v.

ESTATE OF LOUIS STERNBERGER, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Executor,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

## BRIEF FOR THE RESPONDENT.

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## BRIEF FOR THE RESPONDENT.

This case involves a charitable deduction under the Federal Estate Tax. It arises from the Tax Court's rejection of the Commissioner's disallowance of the deduction in the decedent's estate tax return.

### Question Presented.

Whether, in computing the amount of the Federal estate tax, the decedent's estate is entitled to a charitable deduction under Section 812(d) of the Internal Revenue Code for the amount of a bequest of a contingent remainder to charity under which the charities will take unless the

decedent's unmarried daughter (age 27 at the decedent's death) should have issue which would survive both her and her mother.

## Statement.

Louis Sternberger died on June 25, 1947. He was survived by his wife, age 62, and a divorced daughter, age 27, who had no descendants (R. 6). Paragraph First of the Codicil to his Last Will and Testament provides that his residuary estate be held in trust during the joint lives of his wife and daughter and the survivor of them, and that upon the death of the survivor, one-half of the principal be paid to the daughter's descendants then living, and if there be none, to certain named charitable organizations (R. 5). An *inter vivos* trust created by the decedent, and concededly includible in his taxable estate, contained similar provisions (R. 5). The other half of the residuary estate is not involved in this proceeding.[1]

The amount of the charitable remainders, as of the date of decedent's death, was computed by competent and reliable actuarial experts (R. 6). That amount was deducted from the value of the decedent's gross estate to arrive at the taxable estate for estate tax purposes.

In his statutory Notice of Deficiency, the Commissioner denied the deduction, not on the ground now urged by him, but solely because the "actual present value cannot be determined by any known data" (R. 3-4). In the Tax Court, the Commissioner maintained the same position. His sole contention was that the charitable remainders were not susceptible to valuation from any known data (R. 65-6). The Tax Court rejected this contention, hold-

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1. This other half could go to charity only if a large number of collateral relatives all predecease both decedent's wife and daughter. No deduction was claimed for this half because the amount of the charitable interest therein was *de minimis*.

ing that: "The value of a remainder interest contingent upon a person dying without issue may be measured by established and accepted actuarial principles based upon known and reliable data" (R. 6). It found that the present value of these remainders on the date of decedent's death was $.24058 per dollar of trust corpus (R. 10-11), and allowed the deduction.

On appeal the Commissioner interjected a new argument: that deduction of the charitable remainder should be denied because the remainder is contingent. The Court of Appeals for the Second Circuit (Judges Learned Hand, Augustus N. Hand and Thomas W. Swan) rejected the Commissioner's belated argument and unanimously affirmed the decision of the Tax Court.

## SUMMARY OF ARGUMENT.

### I.

The decision below correctly allowed a deduction for the amount of the charitable bequest as found by the Tax Court. Neither the statute, the cases, nor the regulations are authority for petitioner's novel and belated argument that "there may be no deduction for a contingent gift whether it is subject to accurate valuation or not" (Pet. Brief, pp. 7-8).

The right to deduct a charitable remainder depends not on whether it is vested or contingent, but upon whether it has an ascertainable value, *Meierhof* v. *Higgins*, *infra*.

When the decedent's wife and daughter die property valued at approximately three-quarters of a million dollars will go to charity unless the daughter should have issue and the issue survive both her and her mother (R. 3-5; 11). It is the petitioner's contention that because the charitable bequest is contingent, no deduc-

tion whatever should be allowed for this very substantial charitable bequest. Such a contention is squarely in conflict with the statute and is unsupported by the cases and the regulations.

A. Section 812(d) of the Internal Revenue Code prescribes a deduction for "the amount of all bequests" for charitable purposes. This clear and unequivocal language does not provide, as claimed by the petitioner, that the deduction is to be measured by "the amount the charity is unconditionally entitled to receive in the future" (Pet. Brief, p. 17). The right to deduct a charitable remainder is determined as of the date of death. There is no necessary correlation between the date of death valuation and the amount that may ultimately be received by the charity —"The tax is on the act of the testator, not on the receipt of property by the legatees." *Ithaca Trust Co.* v. *U. S.*, *infra*.

The purpose of the statute is to encourage charitable bequests. Petitioner's unprecedented attempt to limit the application of the statute, if sustained, would defeat this purpose.

B. This Court has upheld deductions for charitable bequests whenever the amount of the bequest is ascertainable. None of the cases cited by petitioner are authority for his assertion that no deduction is allowed for a contingent remainder. To the contrary, this Court very succinctly pointed out that "The whole question to be considered is—What is the value of the interest to be saved from the tax?" *U. S.* v. *Provident Trust Co.*, *infra*.

In *Merchants Bank* v. *Commissioner*, *infra*, the case on which petitioner principally relies, the charitable remainder was subject to a power of invasion. Because this power was not limited by any measurable standard, the charitable remainder could not be valued and deduction

was disallowed. This Court said (p. 259) that the case turned on whether the bequest had a presently ascertainable value.

The lower court decisions are in accord with the decisions of this Court. Where the amount of the bequest was not ascertainable the deduction was denied upon that ground. Most of the lower court decisions cited by the petitioner are of this nature. Typical of them is, *Davison* v. *Commissioner, infra,* where a charitable remainder could not be valued because the life tenant possessed a power of appointment whereby she could divert trust corpus to non-charitable uses.

C. The Commissioner's own regulations sustain the deduction. Section 81.44 provides for the valuation of charitable remainders. It says that if the contingency is such that the actuarial tables set forth in Section 81.10 do not apply, then the valuation of present worth must be made "in accordance with the provisions set forth in Section 81.10 by one skilled in actuarial computation". Ignoring this section, petitioner relies upon Section 81.46 which refers to transfers "dependent upon the performance of some act or the happening of a precedent event". This section, entitled "Conditional bequests", applies to the type of situation which arose in *Churchill* v. *U. S.* where the testator devised his farm to the city *on condition* that it be used as a park.

Petitioner argues that because the charities *may* get nothing, no deduction should be allowed. The Tax Court took this into account and did not grant a deduction for the *full* commuted value of the remainder. It assumed that the charities might not receive anything and accordingly granted deduction only for $.24058 per dollar of the trust corpus (R. 10-11).

II.

The value of the contingent remainder was found as fact by the trial court. It was conclusively established by the "reliable and conservative actuarial testimony" (R. 10) presented by taxpayer. The trial court's findings cannot be set aside unless "clearly erroneous". Rule 52(a), Rules of Civil Procedure.

## ARGUMENT.

I.

**The Decedent's Estate is Entitled to a Deduction Under Section 812(d) of the Internal Revenue Code for the Charitable Remainder.**

Neither the statute, the cases, nor the regulations are authority for the statement that contingent charitable remainders are not deductible. Yet this is the argument on which the petitioner now seeks to have this Court reverse the courts below. The weakness and invalidity of this argument is evidenced by the fact that the petitioner himself did not even mention it in his Notice of Deficiency or argue it before the Tax Court.[2]

The right to deduct a charitable remainder depends not on whether it is vested or contingent, but on whether it has an ascertainable value.

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2. Petitioner acknowledges his complete shift of position on appeal (Pet. Brief, Footnote 2, p. 13). He attempts to excuse the belatedness of his argument by citing *Hormel* v. *Helvering*, 312 U. S. 552 and *Helvering* v. *Richter*, 312 U. S. 561. These cases both involved a special circumstance—a new decision by this Court during pendency of the appeal—which is absent in the present case.

**A. The Statute Authorizes the Deduction.**

The applicable statute is Section 812(d) of the Internal Revenue Code. Section 812 provides how the value of the net estate shall be determined. It says: "For the purpose of the tax the value of the net estate shall be determined • • • by deducting from the value of the gross estate" certain deductions. These include:

> "(d) The amount of all bequests, legacies, devises or transfers • • • to or for the use of any corporation organized and operated exclusively for • • • charitable • • • purposes."

Yet the petitioner says: " • • • there may be no deduction for a contingent gift whether it is subject to accurate valuation or not. In short, a bequest of a future interest to a charity is not deductible simply because it can be valued; it must also be shown that the possibility that charity will not ultimately take is so remote as to be negligible" (Pet. Brief, pp. 7-8).

The statute contains no limiting language such as suggested by petitioner's contention. It speaks of "all bequests" for charitable purposes and authorizes deductions of the amount of such bequests.

Petitioner argues that the deduction "depends upon the certainty of receipt by the charity" (Pet. Brief, p. 10). The statute does not so provide. The deduction is not based upon what the charity might ultimately *receive*, but rather upon the amount of the charitable *bequest*. As stated by this court in *Young Men's Christian Association of Columbus, Ohio v. Davis*, 264 U. S. 47 (at p. 50):

> "What was being imposed here was an excise upon the transfer of an estate upon death of the owner. It was not a tax upon succession and receipt of benefits under the law or the will. It was death

duties as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeeded on death, but the interest which ceased by reason of the death.

"Congress was thus looking at the subject from the standpoint of the testator, and not from the immediate point of view of the beneficiaries."

The unsoundness of petitioner's argument that deduction is measured by "the amount charity is unconditionally entitled to receive in the future" (Pet. Brief, p. 17) is graphically demonstrated by *Ithaca Trust Co.* v. *U. S.*, 279 U. S. 151. In that case, the decedent's wife, who was the life beneficiary of a trust having a charitable remainder, died in an accident, less than six months after her husband's death. Accordingly, the amount that charity was to receive was known when the tax was determined. But the tax was not calculated on that amount. This Court said at page 155:

"The first impression is that it is absurd to resort to statistical probabilities when you know the fact. But this is due to inaccurate thinking. The estate so far as may be is settled as of the date of the testator's death. * * * The tax is on the act of the testator, not on the receipt of property by the legatees * * *. Tempting as it is to correct uncertain probabilities by the now certain fact, we are of opinion that it cannot be done, but that the value of the wife's life interest must be estimated by the mortality tables."

The Commissioner himself, in Sections 81.10 and 81.44 of his Estate Tax Regulations 105, prescribes actuarial tables for use in determining the date of death value of charitable remainders. These tables set forth the com-

muted value of the charity's future interest, taking into account the estimated life expectancies of the life tenants. They do not even purport to value the amount the remainderman will actually receive. What the remainderman receives is always the market value of the trust corpus when the life interests terminate and not the date of death commuted value. The life tenant in all likelihood will not obligingly die on the date predicted by the tables. The market value of the trust corpus at that time is almost certain to vary from the value it had when decedent died. Regardless of subsequent market fluctuation and the actual longevity of the life tenant, the estate receives the same deduction. This is so because the deduction is computed as of the date of death.

The petitioner's argument that deduction of a charitable bequest is dependent upon receipt by charity has no basis in law. It is directly contrary to the plain language of the statute which provides for the deduction of *all* charitable bequests. It is also contrary to the statute's underlying purpose. This Court pointed out in *YMCA* v. *Davis, supra* (p. 50), that it was the intention of Congress:

> "to favor gifts for altruistic objects * * * by encouraging testators to make such gifts. Congress was in reality dealing with the testator before his death. It said to him:
>
> > 'If you make such gifts, we'll reduce your death duties and measure them not by your whole estate, but by that amount, less what you give.' "

The legislative intention to encourage charitable bequests is well established. This intention has been expressed by Congress in its special treatment accorded charitable contributions for purposes of income and gift taxes as well as estate taxes. The recently enacted 1954 Internal Revenue Code reaffirms this policy by increasing

the percentage limitation on charitable deductions for income tax purposes from 20% to 30% (1954 I. R. C. §170).

The petitioner's contention, if sustained, would "subvert the policy" of the statute. *United States* v. *Provident Trust Co.*, 291 U. S. 272, 286. As this Court said in that case (at p. 285):

> "We have for consideration simply a statutory provision exempting from a prescribed tax the value of all bequests, etc., made to or for the use of charitable organizations and those which are akin, plainly evincing a legislative policy to encourage such bequests."

The language of the statute is clear. It prescribes a deduction for the amount of all charitable bequests. It contains none of the limitations suggested by the petitioner's contention.

**B. The Decisions Hold that the Right to Deduct the Value of a Charitable Remainder Depends not on Whether it is Contingent or Vested, but on Whether it has an Ascertainable Value.**

1. *Supreme Court Decisions.*

The decisions of this Court support the unequivocal language of the statute. This Court has upheld the deductibility of charitable bequests whenever the amount of the bequest is ascertainable. It has never held that "there may be no deduction for a contingent gift" as claimed by petitioner (Pet. Brief, p. 7).

Petitioner relies upon five decisions of this Court to bolster his novel argument that contingent remainders are not deductible (*Humes* v. *United States*, 276 U. S. 487; *United States* v. *Provident Trust Co.*, *supra*; *Ithaca Trust Co.* v. *United States*, *supra*; *Merchants Bank* v.

*Commissioner*, 320 U. S. 256; and *Henslee* v. *Union Planters Bank*, 335 U. S. 595. No such argument was presented to this Court in any of these cases. None of them decided that contingent remainders are not deductible.

This Court denied deduction of the charitable remainder in *Humes* where the remainder was payable to charity only if the intervening life beneficiary died without issue before attaining the age of 40. The taxpayer had submitted tables dealing with 4440 lives of female members and 1522 lives of male members of the Scotch peerage and sought to apply them to a 15 year old Texas girl. This Court ruled that no valuation of the charitable bequest could be made from such data and therefore denied the deduction, stating at page 492:

> "The court of claims did not find that the present value of the contingent bequests to the charities can be determined by the calculations of actuaries based upon experience tables."

This is in sharp contrast to the case at bar where the value of the charitable remainder was found as fact by the trial court (R. 8). In our case the Tax Court found the valuation from "reliable and conservative actuarial testimony" (R. 10) presented by the taxpayer. This valuation was computed "by a recognized firm of actuaries in accordance with established actuarial principles based upon known and reliable data" (R. 6).

In *Humes*, the government did not argue and this Court did not hold that contingent bequests are not deductible. As the Court of Appeals for the Second Circuit stated in *Meierhof* v. *Higgins*, 129 F. 2d 1002 (at p. 1005):

> "Deductions were denied the taxpayer in cases like *Humes* v. *U. S.* because it was impossible to determine the 'amount' by any accredited method."

Petitioner also cites *United States* v. *Provident Trust Co., supra* (Pet. Brief, p. 28). That case involved the bequest of a charitable remainder contingent upon the death of decedent's daughter without issue. The taxpayer introduced evidence that the daughter, who was 50 years of age and had no issue, was physically incapable of giving birth to a child and consequently the *full* commuted value of the remainder was allowed as a charitable deduction. The allowance of the deduction in that case in no way suggested, as contended by petitioner, that a charitable deduction may not be taken unless the probability of the charity's not taking is so remote as to be negligible.

The other decisions of this Court (*Merchants Bank, Union Planters Bank,* and *Ithaca Trust*), all involved bequests of charitable remainders in which the intervening life estate was subject to a power of invasion. Petitioner in his brief lays great stress on *Merchants Bank,* citing it on numerous occasions (Pet. Brief, pp. 9, 10, 13, 14, 17, 19-21, 25, 27, 29, 30, 36). The issue in all three cases was whether the power of invasion was limited by a measurable standard so as to render the charitable remainder capable of valuation.

In both *Merchants Bank* and *Union Planters Bank* the standard of invasion was so vague and indefinite as to make the charitable remainder immeasurable. In *Union Planters Bank* the trustees could make withdrawals from corpus for the "pleasure, comfort and welfare" of the life beneficiary. The trustees in *Merchants Bank* were to consider the "welfare, comfort and happiness" of the decedent's wife.

The sole issue in both cases was whether the *amount* of the charitable bequest could be determined. In both cases the sole reason advanced by the government for denying deduction was that the bequest had no ascertainable value.

In both cases this Court held that the measureless character of the standards governing invasion precluded such valuation.

Neither of these decisions held or implied, as contended by petitioner, that "* * * deduction may not be allowed for a contingent bequest, regardless of whether it can be valued as of decedent's death" (Pet. Brief, p. 10). Indeed, this Court clearly indicated in its *Merchants Bank* decision (at p. 259):

> "The case * * * turned on whether the bequests to the charity have, as of the testator's death, a presently ascertainable value * * *."

This Court's answer to the question was given at page 261:

> "Since, therefore, neither the amount which the private beneficiary will use nor the present value of the gift can be computed, deduction is not permitted."

In *Ithaca Trust* the standards governing invasion were "fixed in fact and capable of being stated in definite terms of money" (p. 154). This issue of fact having been decided in favor of the taxpayer, the deduction was allowed.

The decisions of this Court cited by petitioner all support the deduction in the instant case. Where the bequest could not be valued, this Court refused the deduction (*Humes, Merchants Bank, Union Planters*). Whenever the *amount* of the charitable bequest could be ascertained this Court allowed the deduction (*Ithaca, Provident Trust*).

None of the cases offers support for petitioner's contention that contingent bequests are not deductible. As stated in *U. S.* v. *Provident Trust Co., supra* (at p. 286):

> "The whole question to be considered is—What is the value of the interest to be saved from the tax?"

To make the deduction turn on whether a future interest is contingent or vested is particularly inappropriate to the administration of modern tax law. The last vestige of tax distinctions based upon difference in form rather than substance went out with this Court's decision in *Hallock* v. *Helvering*, 309 U. S. 106.[3]

The deductibility of a charitable remainder is not dependent upon the label put on the future interest. The question is whether the present value of the bequest can be determined by reliable methods.

2. *Lower Court Decisions.*

Petitioner asserts that "* * * the lower courts * * * have repeatedly held that conditional charitable bequests are not deductible under Section 812 (d) of the Code and its predecessors" (Pet. Brief, pp. 30-1). This assertion is incorrect.

In the case at bar, the Court of Appeals affirmed the Tax Court's decision on the authority of *Meierhof* v. *Higgins*, *supra*.

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3. Prior to *Hallock*, estate taxability of transfers with the possibility of reverter turned upon such subtle distinctions as the difference between transfers subject to a condition precedent and transfers subject to a condition subsequent. Such formal distinctions were cast out by the *Hallock* case where the Court said (at p. 118):

> "The importation of these distinctions and controversies from the law of property into the administration of the estate tax precludes a fair and workable tax system. Essentially the same interests, judged from the point of view of wealth, will be taxable or not, depending upon elusive and subtle casuistries which may have their historic justification but possess no relevance for tax purposes."

In that case a remainder interest of Columbia University was contingent upon the death of a person 71 years of age prior to the deaths of persons aged 74 and 79.[4] The Court of Appeals for the Second Circuit ruled that the value of the contingent remainder to Columbia constituted a valid deduction, stating (at pp. 1005-6):

> "To say the trust was not created for charitable purposes because, under some circumstances, the gift to charity might fail, would import a meaning to the words which would disregard the long-established practice of valuing parallel interests by mortality tables for purposes of taxation.
>
> • • • • •
>
> "It seems unreasonable that in appraising the Meierhof trust the Commissioner should reject mortality tables reflecting precisely the same averages that he insists upon in the valuation of other interests the worth of which is likewise contingent upon the length of persons' lives. It does not seem unreasonable that as the taxpayer takes the risk of an underestimate of the amount of the charitable deduction due to the uncertainty of life, so the Treasury should take the risk of an excessive deduction."

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4. Decedent's will created a trust with income payable to his sister (aged 74) for life. If upon the sister's death, the sister's husband (aged 79) should not then be living, the corpus of the trust was to be paid to the decedent's widow (aged 71) if then living and if not, to Columbia University. If the sister's husband should survive the sister, one-half of the fund was to be held in trust for the life of the husband with corpus payable to decedent's widow upon the husband's death or to Columbia University if the widow should not then be living. The other half of the fund was to be paid upon the sister's death to the widow, if then living, or if not, then to Columbia University.

The Court then summed up the law as follows (p. 1006):

> "The right to deduct the value in a case like the present depends not on whether it is contingent or vested, but on whether it has an ascertainable market value, and in view of the published Treasury practice in handling interests subject to identical uncertainties the taxpayers properly based the amount of their claimed deduction on actuarial computations."

The *Meierhof* decision was followed in *Gardiner* v. *Hassett*, 63 F. Supp. 853 (D. C. Mass.), where testatrix bequeathed the residue of her estate in trust with income payable to her niece for life and then to the niece's husband for life, and then the entire principal to testatrix's brother if then living, and if not, to charity. The Court sustained deduction of the charitable remainder which was valued actuarially.

Petitioner cites other lower court decisions at pages 31-2 of his brief as further authority for his contention that "conditional charitable bequests are not deductible under Section 812(d) of the Code and its predecessors" (Pet. Brief, p. 31). Instead of giving the facts of these cases, he synthesizes an apparently plausible argument by stringing together isolated sentences extracted out of context from several of them (Pet. Brief, pp. 33-34).

An analysis of these cases reveals that they are in full accord with the decisions of this Court. Thus the lower courts deny deduction where the amount of the bequest cannot be determined. In some instances the amount of the bequest was not established because the taxpayer failed to introduce adequate actuarial proof; in others the nature of the contingency made the charitable remainder immeasurable.

*Gammons* v. *Hassett*, 121 F. 2d 229 (C. A. 1st), Cert. denied 314 U. S. 673, and *Knoernschild* v. *Commissioner*, 97 F. 2d 213 (C. A. 7th), were power of invasion cases where the charitable deduction was denied because the standards governing invasion were immeasurable. See *Merchants Bank* and *Union Planters Bank*, *supra*.

In *Gaston Estate* v. *Commissioner*, 2 T. C. 672, *City Bank Farmers' Trust Co.* v. *United States*, 5 F. Supp. 871 (S. D. N. Y.), affirmed on other grounds, 74 F. 2d 692 (C. A. 2d), and *Delaware Trust Co.* v. *Handy*, 53 F. 2d 1042 (D. Del.), deduction was disallowed because there was inadequate proof from which the amount of the charitable bequests could be measured.

In *Davison* v. *Commissioner*, 81 F. 2d 16 (C. A. 2d), it was impossible to value the charitable remainder because the life tenant had a testamentary power of appointment over the trust corpus whereby she could divert the charitable bequest to non-charitable uses.

In *Burdick* v. *Commissioner*, 117 F. 2d 972 (C. A. 2d), cert. denied 314 U. S. 631, the testator bequeathed a sum of money to such educational institutions as his sister might select with a proviso that if she failed to designate within a year the legacy was to lapse into the residuary estate.

In *First Trust Co. of St. Paul State Bank* v. *Reynolds*, 137 F. 2d 518, (C. A. 8th), charity could get nothing without the consent of the decedent's wife.

In *Norris* v. *Commissioner*, 134 F. 2d 796 (C. A. 7th), cert. denied 320 U. S. 756, and *Mississippi Valley Trust Co.* v. *Commissioner*, 72 F. 2d 197 (C. A. 8th), cert. denied 293 U. S. 604, deductions of alleged charitable "bequests" were denied on the ground that they were precatory and not bequests at all.

In *Helvering* v. *Union Trust Co.*, 125 F. 2d 401 (C. A. 4th), cert. denied 316 U. S. 696, testatrix directed that half of her estate go to the Girls Scouts provided that twenty years after her death the Scouts were still operating the country house the testatrix had given them, and on the further condition that the bequest be used for character building purposes.

In *Churchill* v. *United States*, 68 F. Supp. 267 (E. D. Wisc.), testator devised his farm to the city on condition that the city accept it and use it as a park.

While there is dicta in *Newton Trust Co.* v. *Commissioner*, 160 F. 2d 175 (C. A. 1st), supporting petitioner's contention, the decision was based upon the fact that the standards governing a power of invasion were measureless, thus rending the charitable interest incapable of valuation. There are also expressions favorable to petitioner's contention in *Wood* v. *United States*, 20 F. Supp. 197 (W. D. Ark.), *Hoagland* v. *Kavanagh*, 36 F. Supp. 875 (E. D. Mich.), and *Graff* v. *Smith*, 100 F. Supp. 42 (E. D. Pa.), but in the latter two there was also inadequate evidence in the record from which to base valuation of the charitable interest. In *Wood* v. *United States* the court refused to recognize actuarial evidence introduced by the taxpayer. We submit that this case was incorrectly decided.

With the exceptions noted, it is clear that the lower court cases, as well as the decisions of this Court, refute the petitioner's contention that contingent bequests are not deductible. The cases consistently allow deduction where the *amount* of the bequest can be determined, regardless of whether the bequest is vested or contingent. As stated in *Meierhof, supra* (p. 1006):

> "The right to deduct the value in a case like the present depends not on whether it is contingent or vested, but on whether it has an ascertainable value, • • •."

## C. The Treasury Regulations Authorize Deduction of Charitable Remainders if the Amount is Presently Ascertainable.

To support his contention that there may be no deduction for a contingent gift whether or not it is subject to accurate valuation (Pet. Brief, p. 7) petitioner relies on Section 81.46 of his Regulation 105 (Pet. Brief, p. 13, *et seq.*).

Section 81.44 of Regulations 105 entitled "Transfers for public, charitable, religious, etc. uses" provides that if a trust is created for both charitable and private use, deduction may be taken of "the value of the beneficial interest" of the charitable use "only insofar as such interest is presently ascertainable". It then states that Section 81.10 sets forth principles to be applied in determining the present worth of the deferred use and refers to the tables in that section which give figures for computing the value of a remainder interest after one life. Then this significant language appears:

> "If the present worth of a remainder bequeathed for charitable use is dependent upon determination of more than one life, *or in any other manner rendering inapplicable Table A or B of §81.10,* the claim for the deduction must be supported by a full statement, in duplicate, of the computation of the present worth made, in accordance with the principle set forth in §81.10, by one skilled in actuarial computations." (Emphasis supplied.)

This is precisely what the taxpayer did in the present case. But petitioner ignores this section and relies solely on Section 81.46 to support his contention that no deduction should be allowed for a contingent charitable bequest. He lengthily and stoutly defends the validity of this section (Pet. Brief, pp. 13-27). We do not dispute its validity. We do contend that it is inapplicable.

Petitioner relies on this section as authority for his proposition that for a bequest of a charitable remainder to be deductible, it must "be shown that the possibility that charity will not ultimately take, is so remote as to be negligible" (Pet. Brief, p. 8). This section entitled "Conditional bequests" (not "Contingent bequests") refers to transfers "dependent upon the performance of some act or the happening of a precedent event." Obviously this section is intended to apply to the type of situation which arose in *Churchill* v. *U. S. supra*, and *U. S.* v. *Fourth Nat. Bank in Wichita, Kan.*, 83 F. 2d 85 (C. A. 10th), cert. denied 299 U. S. 575. In the *Churchill* case testator devised his farm to the city *on condition* that it be used as a park and provided for a gift over to named legatees if or when it should cease to be so used. The court denied a deduction on the basis of Section 81.46 of the Regulations stating at page 269:

> "Because of the conditions attached to the devise and because of the possibility of charity failing to accept or, if accepting, failing to continue to maintain the tract as a park, the value, of the devise for public purposes could not be ascertained as of the date of decedent's death."

In *U. S.* v. *Fourth Nat. Bank in Wichita, Kan.*, decedent gave $100,000 toward a Church building fund "upon condition that the church should contribute an equal amount, with other stipulations" (p. 86). Here again the deduction was naturally disallowed. Such cases are totally different from the one at bar. In our case the deduction is a proper one because, as the court said in *Fourth Nat. Bank in Wichita* (at p. 90):

> "* * * if the value of that contingent interest can be ascertained by reasonable methods or by recognized data as of the date of the death of a testator,

> the amount for deduction should be so determined and the deduction allowed."

Petitioner's interpretation of Section 81.46 of the Regulation was unequivocally rejected 12 years ago in *Meierhof* v. *Higgins*, *supra*. In dismissing the identical contention which petitioner now makes, the Court of Appeals for the Second Circuit stated (p. 1005):

> "Article 47 [now sec. 81.46] must, however, be read in connection with Article 44 [now sec. 81.44] * * * The amount of Meierhof's bequest to Columbia was determined in accordance with practice long used by the Treasury and embedded in the Regulations. We see no reason for abandoning this established practice and find nothing in the Regulations to require such a departure."

Although the government did not seek certiorari in the *Meierhof* case, petitioner now contends that Section 81.46 bars the deduction. He is either interpreting this regulation incorrectly, or, if the regulation says what he contends, it is contrary to the statute and therefore invalid. An administrative agency's regulation is only the agency's own interpretation of the law. If it runs counter to the statute it must be disregarded. *Manhattan General Equipment Co.* v. *Commissioner*, 297 U. S. 129; *Koshland* v. *Helvering*, 298 U. S. 446.

The petitioner recognizes that his interpretation of the Regulations was rejected in *Meierhof*, but he now contends that the decision of this Court in *Merchants Bank* requires a reversal of the *Meierhof* decision—even though the *Merchants Bank* case dealt with an entirely different question concerning a different portion of the Regulations. Because *Merchants Bank* was a power of invasion case it "specifically involved the *second* paragraph of Article 47 of

Treasury Regulations 80 * * * (identical with the second paragraph of the present Section 81.46 of Treasury Regulations 105) * * * " (Pet. Brief, p. 19). Despite this salient difference the petitioner reasons that the *Merchants Bank* case establishes the validity of the *first* paragraph of the same Regulations. This Court in the *Merchants Bank* decision did not even mention *Meierhof*. It did not decide or even consider the contention now made by the petitioner. It clearly stated the basis of its decision when it said (p. 259):

> "The case, * * * turns on whether the bequests to the charities have, as of the testator's death, a 'presently ascertainable' value * * *."

In cases like *Merchants Bank* which involve powers of invasion the question is whether the standards governing invasion are measurable. In cases like *Meierhof* and the one at bar, no such standards need be measured; the value of the charitable request can be determined actuarially.

Section 81.46 presupposes that if it appears that "the possibility that charity will not take is so remote as to be negligible" then "deduction is allowable" for the *full amount* of the charitable bequest. Petitioner argues as if a deduction for the full amount is sought in the present case (Pet. Brief, p. 26, *passim*).

The taxpayer here does not contend that charity's chance of not taking is so remote as to be negligible. Nor does the taxpayer contend that the estate should be given a deduction of the *full amount* of the commuted value of the charitable remainder. On the contrary, the taxpayer admits that there is a real possibility that the charities will not take. It is for that reason that instead of seeking deduction of the full commuted value of the charitable remainder, only a fraction of that amount is claimed. That

is the amount that the evidence shows was the present value of the charitable remainder.

Petitioner in effect argues that because the charities may get nothing no deduction should be allowed. He argues as if the Tax Court did not take this possibility into consideration. But it did. It did not assume that the charities were certain to receive. Had it done so it would have granted a deduction for the full commuted value of the remainder as of the date of death. It did not do this nor was such a deduction claimed. The Tax Court granted a deduction upon the assumption that the charities might not receive anything. Accordingly the deduction was only $.24053 per dollar of the trust corpus (R. 10-11).

This situation is completely different from the *Provident Trust* and other cases where deduction was granted for the full commuted value of the charitable remainder valued as of the date of death.

In the case at bar, even if the daughter had died without issue the day after her father's death, the estate would not be entitled to deduct the full amount received by charity but rather only the diminished value of the remainder. Regardless of subsequent events, the amount of the deduction is nevertheless determined actuarially on the date of death (*Ithaca Trust Co., supra*).

## II.

**The Value of the Contingent Charitable Remainder as Found by the Tax Court was Conclusively Established by the Undisputed Evidence.**

Petitioner's final contention is that "The actuarial computation accepted by the Tax Court and the court below as the amount of the deduction is no more than a guess as to value" (Pet. Brief, p. 37). Such a contention is entirely refuted by the record. The Tax Court said:

> "Petitioner [the taxpayer] presented reliable and conservative actuarial testimony to estimate the value of the contingent remainder to charity at the date of decedent's death to support his deduction of $179,154.19. We do not feel that we are at liberty to disregard this testimony of competent actuaries who have made their computations in accordance with what appear to be well recognized actuarial methods" (R. 10).

The trial court found as fact that the present value of the charitable remainders at the date of decedent's death was $.24058 per dollar of trust corpus.[5] These findings of fact cannot now be set aside unless they are "clearly erroneous", Rule 52(a), Rules of Civil Procedure for the United States District Courts; applicable to Tax Court's findings of fact, Sec. 1141(a), Internal Revenue Code of 1939.

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5. The Court found that the date of death value of the remainders was $.24094 per dollar of trust corpus based on legitimate descendants only $.24058 including illegitimates, and $.18384 assuming that remarriage of decedent's daughter alone would defeat the charitable remainders (R. 8). The Court determined that the $.24058 figure should be used (R. 11).

Petitioner attempts to overcome the trial court's findings by citing *Robinette* v. *Helvering*, 318 U. S. 184 and *Humes* v. *United States*, *supra*. In both cases the trial court was unable to determine the value of the charitable interest owing to insufficient proof.

In *Robinette*, a gift tax case, this Court refused to "guess" at the value of a reversionary interest contingent upon the probability of issue to a 30 year old woman because of the taxpayer's failure to introduce evidence on this point. The record was entirely barren of actuarial proof. As indicated above (p. 11) the proof in the *Humes* case was also inadequate. See *Estate of Pompeo Maresi*, 6 T. C. 582, 586, aff'd 156 F. 2d 929 (C. A. 2nd).

The valuation of the charitable remainders in the case at bar was based upon the Combined Experience Mortality Table, prescribed in Section 81.10 of the Commissioner's Estate Tax Regulations; The American Remarriage Table, published by the Casualty Actuary Society, accepted as valid for estate tax purposes by the United States Treasury Department; and a table prepared in accordance with accepted actuarial principles based upon known and reliable data derived from the Vital Statistics of the United States, 1940, published by the Bureau of the Census (R. 7-8).

As indicated, the Combined Experience Mortality Table is prescribed by the Commissioner himself. In *Commissioner* v. *Maresi*, *supra*, a debt deduction was allowed under Section 812 (b) of the Internal Revenue Code for an estate's contingent liability to make payments to decedent's divorced wife until she should die or remarry, the valuation of which was based on the American Remarriage Table. The third table constituted a compilation of figures obtained from the United States Bureau of the Census; the identical experience data is employed in the new tables promulgated under Section

81.10 of Treasury Regulations 105 (T. D. 5906, 1952-1 Cum. Bull. 155). It is considered even more reliable than the American Remarriage Table (R. 39). As found by the Tax Court, this table was "prepared in accordance with accepted actuarial principles based upon known and reliable data"[6] (R. 7).

During the last five years Congress has twice recognized the value of actuarial principles and required them to be applied in the determination of estate tax liability. Section 2037 of the 1954 Internal Revenue Code reenacted Section 7 of the Technical Changes Act of 1949. This provides that an *inter vivos* transfer in which the grantor retains a possibility of reverter will not result in the inclusion of the transferred property in the grantor's estate if the value of the reverter does not exceed 5% of the total value of the property. The statute expressly states that the reverter shall be valued:

> "* * * by usual methods of valuation, including the use of tables of mortality and *actuarial principles.*" (Emphasis supplied.)

In construing this section, Section 81.17, Regulations 105 says:

> "Such value shall be ascertained according to *recognized valuation principles* applicable in determining the value for estate and gift tax purposes of future or *conditional* interests in property * * *." (Emphasis supplied.)

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6. Even if this table were to be disregarded, the taxpayer would be entitled to a minimum deduction of $.18384 per dollar of trust corpus, the present value of the charitable remainders at date of decedent's death, assuming that the daughter's remarriage alone would defeat the charitable remainder (R. 8).

If the decedent's *inter vivos* trust in the present case had been irrevocable and contained a possibility of reverter to decedent or his estate (instead of providing for the remainder to charity) this provision of Section 2037 would apply. The Commissioner would then properly be urging that the evidence which he now attacks is conclusive proof of the taxability of the trust as part of the estate.

The value of the remainder has been fully established by the proofs submitted at the trial and found as fact by the Tax Court. These findings are clearly correct and cannot now be set aside (Rule 52(a) *supra*).

## CONCLUSION.

**The decision below is correct and should be affirmed.**

Respectfully submitted,

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